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Supreme Court, U.S.
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No. 98-437

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1998

ARTHUR CALDERON,

Petitioner,

vs.

RUSSELL COLEMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

BRIEF IN OPPOSITION

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INTRODUCTION

This is a capital case. At the penalty phase of the trial, the jury had two sentencing options: death or life without the possibility of parole. The court instructed the jury that if it sentenced respondent to life without the possibility of parole, the Governor of California had the full and unfettered power to commute the sentence to life **with** the possibility of parole.

The instruction was clear and unambiguous. It was also **incorrect**. Under California law, the Governor does **not** have the unrestricted authority to commute a sentence if, as here, the prisoner has two or more prior felony convictions. In such a case, a prisoner seeking commutation must clear more and higher hurdles, including the consent of the California Supreme Court and the Board of Prison Terms. The jury, unaware of these obstacles to commutation, sentenced respondent to death.

In the district court, the State of California argued that the instruction, even though erroneous, was not cause for reversal under the facts of this case, citing Brecht v. Abrahamson, 507 U.S. 619 (1993). This was so, the state asserted, because the prosecutor never linked the need for execution to the possibility that respondent might be paroled. District court Judge Ronald M. Whyte reviewed the record and rejected both contentions.

To the contrary, after reviewing the entire record the district court held that the prosecutor "built his penalty-phase case around Coleman's prior felonies and his propensity

for violence, both in and out of prison." Appendix to Petition for Writ of Certiorari ("State Appendix") at 150. After reviewing the entire record, the court ruled penalty phase relief appropriate "in light of the prosecution argument, the aggravating evidence and the record as a whole . . . ." State Appendix at 149.

The State appealed. Once again it argued that the error was not reversible because, under Brecht, it did not have "a substantial and injurious effect or influence" on the jury's decision to sentence respondent to death. State Appendix at 32. As in the district court, the State claimed the erroneous instruction was inconsequential to the death sentence because the prosecutor never argued that respondent should be executed because he might be released one day. A panel of the Ninth Circuit Court of Appeals consisting of Judges Thompson, Brunetti, and Schroeder unanimously rejected the State's argument. Writing for the Court, Judge Thompson ruled "the district court did not err in holding that Coleman was denied due process by the state trial court's inaccurate commutation instruction." State Appendix at 33.

The State now seeks review in this Court. For a third time the State recycles its factual assertion that the prosecutor never linked the need for execution to the possibility that respondent might be freed from prison. Petition for Certiorari at 12. This argument -- firmly rejected by the district court -- is the cornerstone of the State's claim that the panel has fashioned an "aberrant" rule of automatic reversal for instructional error. Petition for Certiorari at 9.

In fact, the State dramatically overstates the nature of Judge Thompson's ruling. The Court of Appeal neither ignored nor failed to apply Brecht in this case. Instead, the panel cited and relied upon Brecht in unanimously affirming the order of the district court. State Appendix at 32-33. The district court, in turn, thoroughly reviewed the record of the case and found the error reversible based on the particular facts of this case. Contrary to the State's argument, neither the district court nor the Court of Appeals invoked a rule of automatic reversal in this case. Moreover, as the state's own analysis shows, the instructional error which occurred in this case has not occurred since 1984 and is present in only one other case which occurred prior to that date.

In sum, this case presents no issue worthy of this Court's consideration. Certiorari should be denied.

STATEMENT OF FACTS

At the penalty phase, the jury had a choice of two sentences: life without possibility of parole or death. The jury was then given the so-called "Briggs" instruction. This explained that if the jury chose the life **without** parole option, the Governor had full power to commute the sentence to a lesser one which would **include** the possibility of parole. RT 1059-1060.[1]

There is no dispute that under the circumstances of this case, the Briggs instruction was fundamentally inaccurate. Because respondent had suffered prior felony convictions, the Governor did **not** have the unfettered power to commute his sentence.

---

[1] The entire instruction read as follows:

> You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime.
>
> Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole.
>
> So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modification power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant.
>
> You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole. RT 1059-1060.

Instead, substantial additional hurdles would have to be crossed before respondent could ever be paroled. First, the Governor would have to forward respondent's application for pardon or commutation to the Board of Prison Terms. The Board of Prison Terms, in turn, would have to prepare a written recommendation. If the Board recommended to deny commutation, the application could not proceed absent special circumstances. If the Board recommended commutation, the application would then be forwarded to the California Supreme Court. Unless a majority of justices recommended a disposition in respondent's favor, the application could not proceed. If a majority of the supreme court recommended a favorable disposition, then -- and only then -- would the Governor have the power to commute. The Governor could then decline to exercise that power. Cal. Pen. Code sections 4802, 4813, 4850, 4851, 4852, 4852.16; Cal. Const. Art. 5, section 8.

The State does not dispute that the jury which decided whether respondent would live or die was never advised as to any of these limitations on the Governor's power to commute. Nor does the State dispute that the prosecutor capitalized on the inaccurate instruction by introducing documents and testimony about respondent's prior convictions.

Instead, the state repeats the factual assertion it made below, suggesting "the issue of life or death was never connected to the possibility that petitioner [sic] would leave prison." Petition for Certiorari at 12. The lower courts rejected this assertion; as the district court

explicitly concluded, "the prosecutor built his penalty-phase case around Coleman's prior felonies and his propensity for violence, both in and out of prison." State Appendix at 150.

The record amply supports this finding. During his closing argument, the prosecutor again and again focused upon respondent's prior convictions, repeatedly drawing the jury's attention to the potential danger respondent would pose not merely in prison, but to society at large. The prosecutor argued death was appropriate because respondent "has already demonstrated what he is capable of doing on numerous occasions to each and every one of us." RT 1012. Death was appropriate because respondent "is manipulative, he is dangerous to all of us." RT 1012. Respondent "has demonstrated his inability to coexist with us in society . . . ." RT 1026. After specifically focusing on respondent as a potential danger to others in prison (RT 1029), the prosecutor broadened his argument and "implore[d]" the jury to impose death not only because respondent might be a danger in prison, but "for our benefit" as well. RT 1030.

In the district court respondent proffered evidence showing that the penalty phase jury accepted the prosecutor's invitation and discussed the possibility of parole in determining if respondent should die. In fact, discussions regarding the possibility that respondent would be

paroled were the "most significant part of the [penalty phase] discussions." See Coleman v. Calderon, No. 89-1906 RMW, Respondent's Motion to Expand Record (filed January 5, 1995). This evidence did not leave the matter in doubt; according to juror Verda New, the possibility of parole was a much discussed topic in deciding whether respondent should live or die:

> "[The jurors] openly discussed that Russell Coleman would be released from prison unless we sentenced him to death. Several jurors stated that he could be paroled if we sentenced him to life in prison. . . . Many of the jurors expressed their fear that if we failed to sentence Mr. Coleman to death, the courts or the Governor could allow him to be released from prison. This was the most significant part of our discussions regarding the appropriate penalty." Ibid.[2]

Relying on the Ninth Circuit's opinion in Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994), the district court concluded that the instruction violated the Eighth Amendment because it was both inaccurate and misleading. In light of respondent's prior convictions, and the fact that "the prosecutor built his penalty-phase case around Coleman's prior felonies and his propensity for violence, both in and out of prison," the district court concluded that the inaccurate Briggs instruction prevented the jury from giving a reasoned moral response to the penalty phase evidence and argument. Accordingly, the court granted the writ and

[2] Later, New testified in a deposition where the state's attorney h[illegible] full opportunity to cross-examine her about these statements. See Coleman v. Calderon, No. 89-1906 RMW Deposition of Verda New (filed on April 15, 1996). Although the district court later excluded New's evidence at the state's insistence, at the deposition New affirmed under oath that her declaration accurately described the jury's discussion of the possibility that respondent would be released from prison even if he was sentenced to life without parole. Id. at 20-21. The state has never countered this evidence.

ordered a new penalty phase. State's Appendix at 142-151. The panel adopted this rationale and affirmed the grant of penalty phase relief. State Appendix at 28-33. In reaching this result, the panel found that the error was prejudicial in this case, citing this Court's decision in Brecht v. Abrahamson, 507 U.S. 619. State Appendix at 32.

The state seeks review. The state concedes that it does **not** seek review on "[t]he question whether inaccurate penalty phase information about commutation violates the Eighth Amendment . . . ." Petition for Certiorari at 11, n.5. Instead, the state contends that the panel's application of Brecht to this error was flawed.

This contention is hardly novel. In fact, this is the second time the state has sought review of this identical question. In Hamilton v. Vasquez, 17 F.3d 1149 the state sought certiorari alleging that Brecht had not been properly applied to this identical error. Calderon v. Hamilton, No. 93-1652, State's Petition for Writ of Certiorari at i-ii, 24-51. This Court denied certiorari. Calderon v. Hamilton, 512 U.S. 1220 (1994).

The State now recycles this argument. Seeking to make this case worthy of review, however, the state suggests with alarm that the panel broadly held Brecht v. Abrahamson, 507 U.S. 619 need not be applied to state court instructional errors. Petition for Certiorari at i. Instead, it "announced an unauthorized rule automatically reversing a state judgment for trial error." Petition for Certiorari at 7. Finally, certiorari is required, the state argues, because "[t]he precedential effect of this extraordinary Ninth Circuit rule is . . . potentially

devastating . . . ." Petition for Certiorari at 14. Curiously, the state never sought rehearing to ask the panel to reconsider what the state now claims was a watershed ruling abandoning the rule in Brecht.

REASONS FOR DENYING THE WRIT

We start with two points of agreement. First, it was clear error to instruct the jury that the governor alone could commute respondent's sentence to make him eligible for parole. Because the governor had no such power, this instruction gave the jury fundamentally inaccurate information about the only non-death option in this case. As Judge Thompson held for the unanimous panel, and as respondent does not now dispute, the instruction "dramatically overstates the possibility of commuting the life sentence of a person such as Coleman . . . ." State Appendix at 31. Second, the District Court found that the prosecutor "built his penalty-phase case" around respondent's "propensity for violence, both in and out of prison." State Appendix at 150.[3]

On this record, review of the panel's harmless error analysis is unwarranted. First, the panel did not refuse to apply Brecht v. Abrahamson, 507 U.S. 619. State Appendix at 32-33. Nor did it "announce[] an unauthorized rule automatically reversing a state judgment

[3] The state suggests that the instruction was "ambiguous." Petition for Certiorari at i. To say that an instruction is "ambiguous" means that it is capable of two or more different interpretations. The instruction in this case was not ambiguous, it was clear as a bell. It was also wrong.

for trial error." Instead, the panel cited and applied Brecht and held that the particular error in respondent's case -- where a capital sentencing jury was given false and misleading information about the only non-death option presented to it -- satisfied Brecht. State Appendix at 32-33. In addition, and setting aside the state's dramatic hyperbole, the precedential impact of the ruling in this case is not only not "devastating," but **by the state's own admission**, is now limited to a universe of one case.

These arguments are set out more fully below. Contrary to the state's assertion, the sky is not falling because of Judge Thompson's decision in this case. Certiorari should be denied.

ARGUMENT

I. BECAUSE JUDGE THOMPSON CITED AND FAITHFULLY APPLIED BRECHT V. ABRAHAMSON, 507 U.S. 619 TO THE ERROR IN THIS CASE, CERTIORARI IS UNWARRANTED.

At the penalty phase in this case, the jury was told to choose between a sentence of life without parole or death. As the panel accurately noted, the jury was then instructed that if it selected the life without parole option, the governor alone could commute respondent's sentence to one that would include parole as an option. State Appendix at 28-29.

As all now agree, and the panel held, this information was false. State Appendix at 29-32. Because of respondent's prior record, the governor had no such power. Ibid. The jury never knew this.

The jury did know, however, that respondent had prior convictions. Moreover, the jury also knew that the prosecutor repeatedly asked it to impose death because of respondent's "propensity for violence, both in and out of prison." State Appendix at 150; RT 1012, 1026, 129, 1030. During its deliberations, the jury even asked to see a copy of the documents which proved respondent's prior convictions. RT 1068-1072. As the district court found, however, the jury did not know that these very same convictions -- used so forcefully by the prosecutor in arguing that respondent would be a danger if released -- actually "made parole considerably less likely." State Appendix at 150.

In assessing the propriety of the Brecht analysis in this case, it is critical to understand the consequences of the trial court's error. Because of the inaccurate instruction, the jury deciding whether respondent would live or die in this case (1) could not give mitigating effect to penalty phase evidence (2) was "misinform[ed] . . . about the nature of one sentencing option" and (3) "no longer underst[ood] the choice they [were] asked to make." State Appendix at 31, 150. This Court has long recognized that such errors are extremely prejudicial in the context of the normative decisions which a jury must make in determining if a defendant will live or die. See e.g., Penry v. Lynaugh, 492 U.S. 302 (1989)(new penalty phase required where penalty phase instructions precluded jury from

giving mitigating effect to penalty phase evidence); Lockett v. Ohio, 438 U.S. 586 (1978)(same); Simmons v. South Carolina, 512 U.S. 154 (1994) (new penalty phase required where jury was given inaccurate information about one of two sentencing options in capital case); Caldwell v. Mississippi, 472 U.S. 320 (1986)(same).

The state does not take issue with any of these conclusions. Petition for Certiorari at 11, n.5. Instead, it argues that Judge Thompson's analysis under Brecht was insufficient because it did not detail "the trial context of the error." Petition for Certiorari at 12.

Contrary to the state's implicit suggestion, however, Brecht does not require that federal courts employ any particular magic words. Contrary to the state's explicit suggestion, the federal courts in this case neither applied a rule of "automatic reversal" nor refused to apply Brecht v. Abrahamson, 507 U.S. 619.

For example, the district court performed a detailed review of the penalty phase evidence presented and the prosecutor's argument for death and granted penalty phase relief "in light of the prosecution argument, the aggravating evidence and the record as a whole." State Appendix at 149; see State Appendix at 142-151. In turn, Judges Thompson, Brunetti and Schroeder looked at the consequences of the error on the facts of this case, explicitly cited Brecht v. Abrahamson, 507 U.S. 619, and concluded that the district court did not err in finding the error had a "'substantial and injurious effect or influence on the jury's sentence of death.'" State Appendix at 32. As noted, these conclusions are consistent with every case

this Court has ever decided involving errors which either precluded consideration of mitigating evidence or provided inaccurate information about the consequences of a particular sentence choice. See Simmons v. South Carolina, 512 U.S. 154; Penry v. Lynaugh, 492 U.S. 302; Caldwell v. Mississippi, 472 U.S. 320: Lockett v. Ohio, 438 U.S. 586. Moreover, and once again contrary to the state's suggestion, the panel did not "announce[] an unauthorized rule automatically reversing a state judgment for trial error." Instead, given the consequences of the state court's error discussed above and the prosecutor's repeated reliance on respondent's danger to the community, the panel properly upheld the district court's conclusion that Brecht had been satisfied.

This ruling not only follows this Court's precedents, but follows the Circuit's precedents as well. Various panels of the Ninth Circuit have made clear time and again that the Brecht standard of prejudice is to be applied to constitutional errors which occur in state court. See, e.g., Franklin v. Henry, 122 F.3d 1270 (9th Cir. 1997)(applying Brecht to evidentiary error); Hanna v. Riveland, 87 F.3d 1034 (9th Cir. 1996)(instructional errors); Thompson v. Borg, 74 F.3d 1571 (9th Cir. 1996)(jury misconduct); Pope v. Zenon, 69 F.3d 1018 (9th Cir. 1996)(Miranda violation); Lee v. Marshall, 42 F.3d 1296 (9th Cir. 1994)(jury misconduct); Hardnett v. Marshall, 25 F.3d 875 (9th Cir. 1994)(prosecutorial misconduct); Wade v. Calderon, 29 F.3d 1312, 1322 (9th Cir. 1994)(instructional error). Because the Brecht analysis in this case fit squarely within the precedents of this Court and the Circuit alike, certiorari is unwarranted.

II. BECAUSE THE ERROR IN THIS CASE INVOLVES AN INSTRUCTION UNIQUE TO CALIFORNIA CASES, AN ERROR WHICH REMAINS IN ONLY ONE PENDING CASE OTHER THAN THIS ONE, CERTIORARI IS UNWARRANTED.

Certiorari is unwarranted for a second reason as well. The error in this case was in the trial court's provision of the so-called Briggs instruction **in a case where the defendant had two or more prior convictions**. Only in such a case is the instruction inaccurate.

Significantly, however, under state law the Briggs instruction has not been given in any California case since 1984. See People v. Ramos, 37 Cal.3d 136 (1984)(holding that Briggs instruction was no longer to be given). Moreover, as the state itself has advised this Court, prior to 1984 the instruction was given in a total of only four cases involving prior felons. Calderon v. Hamilton, No. 93-1652, State's Petition for Writ of Certiorari at 17 (citing, in addition to the then pending Hamilton case, People v. Coleman, 46 Cal.3d 749 (1988), People v. McLain, 46 Cal.3d 97 (1988) and People v. Whitt, 51 Cal.3d 620 (1990).)

Prior to this case, the Ninth Circuit had granted relief in two of these four cases. See McLain v. Calderon, 134 F.3d 1383 (9th Cir. 1998); Hamilton v Vasquez, 17 F.3d 1149. This Court has denied certiorari in Hamilton. Calderon v. Hamilton, 512 U.S. 1220. The Court has denied certiorari in McLain. Calderon v. McLain, ___ U.S. ___, 1998 W.L. 289408 (October 13, 1998).

Thus, by the state's own count, the ruling in this case now impacts only one remaining case, People v. Whitt, 51 Cal.3d 620. It is difficult to imagine a more limited universe of cases on which to predicate a request for certiorari. That request should be denied.

CONCLUSION

The issue in this case involves an instruction unique to California law. It impacts a total of one other case. Moreover, far from "announc[ing] an unauthorized rule automatically reversing a state judgment for trial error," Judge Thompson's opinion for the unanimous panel cited Brecht, applied Brecht and concluded that the error had a "'substantial and injurious effect or influence on the jury's sentence of death.'" The state's Petition for Writ of Certiorari should be denied.

DATED: 10/3/93

Respectfully submitted,

GARDNER & DERHAM
CLIFF GARDNER
ROBERT DERHAM

By Cliff Gardner
Counsel of Record

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CERTIFICATE OF SERVICE

I, Christiana G. Hoffman, am over 18 years of age. My business address is Ghirardelli Square, 900 North Point, San Francisco, California, 94109. I am not a party to this action.

On October 13, 1998 I served the within

BRIEF IN OPPOSITION

upon the party named below by depositing a true copy in a United States mailbox in San Francisco, California, in a sealed envelope, postage prepaid, and addressed as follows:

Morris Beatus
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San Francisco, CA 9105

I declare under penalty of perjury that the foregoing is true.

Executed on October 13, 1998, in San Francisco, California.

Christiana G. Hoffman

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October 13, 1998

Office of the Clerk
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Re: Calderon v. Coleman, No. 98-437

Dear Sir or Madam:

Enclosed for filing in the above captioned case please find the original and 12 copies of respondent's Brief in Opposition. I have also enclosed the original and one copy of respondent's Motion to Proceed in Forma Pauperis.

There is an extra copy of each document for endorsement and return in the enclosed self-addressed stamped envelope.

Please feel free to call me if there are any questions.

Sincerely,

Cliff Gardner
for GARDNER & DERHAM

Encl.

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